

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 61843-1-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
MICHAEL R. FORRESTER,)	Unpublished Opinion
B.D. 05-25-89,)	
)	FILED: July 6, 2009
Appellant.)	
)	

Lau, J. — Forrester challenges his conviction for three counts of first degree child rape contending that (1) the trial court lacked adult court jurisdiction, (2) his attorney deprived him of effective assistance of counsel, and (3) the trial court erred in imposing an indeterminate sentence. Because Forrester was 18 at the time of trial, adult court jurisdiction was proper. And because his attorney's performance was not deficient or prejudicial, we affirm but remand for sentencing.

FACTS

Michael Forrester turned 16 on May 25, 2005. He moved with his family to a new house in August 2005. He lived there with his parents and siblings, including his

half-sister K.F., who was seven years younger than he was. On July 12, 2006, when Forrester was 17, K.F. told her mother that Forrester had been sexually abusing her. K.F.'s mother took her to the hospital and reported the abuse to the police.

Two days later, King County Sheriff's Deputy Janette Luitgaarden arranged for K.F. to meet with a child interview specialist, Ashley Wilske. K.F. told Wilske that Forrester forced her to put "his private" in her mouth and generally described several more instances of oral penetration. K.F. also disclosed that Forrester made her remove her clothes and rubbed his penis against her on multiple occasions. She told Wilske that one incident involving oral penetration happened at the end of 2005, in the bathroom of the new house.

On November 21, 2006, the State charged 17-year-old Forrester in juvenile court with one count of first degree child rape and one count of first degree child molestation. The information alleged a charging period for the rape count that ended one day before Forrester's 16th birthday. On April 18, 2007, after plea negotiations failed, the State filed charges in adult court pursuant to RCW 13.04.030(1)(e)(v)(C), which makes adult court jurisdiction automatic and mandatory when "[t]he juvenile is sixteen or seventeen years old on the date the alleged offense is committed" if the alleged offense is first degree child rape. In the information, the State expanded the charging period for the rape count to July 12, 2006, which included dates when Forrester was 16 and 17 in addition to a period when he was 15. Forrester was still 17 when he was charged in adult court. The certification for determination of probable cause attached to the information alleged Forrester sexually assaulted K.F. at their new house, which would

have been after he turned 16.

At the same time the State filed charges in adult court, it moved to dismiss the charges in juvenile court. In the written motion, the deputy prosecuting attorney certified under penalty of perjury that “the evidence contained in the discovery supports several charges of Rape of a Child in the First Degree and at least one of those incidents occurred after the respondent was sixteen years of age.” The juvenile court granted the State’s motion. Forrester did not object or oppose the motion.

Forrester turned 18 on May 25, 2007. On March 13, 2008, at the beginning of Forrester’s trial, the State amended the information to charge Forrester with two additional counts of first degree child rape involving K.F. The charging period for each count was August 8, 2004, to July 12, 2006.

At trial, K.F. testified that Forrester made her put his penis in her mouth and told her to imagine it was a lollypop. She also said that incidents of oral penetration happened “[a] lot.” Report of Proceedings (Mar. 26, 2008) at 80. In addition to her trial testimony, the State played the recording of K.F.’s interview with Wilske to the jury, which included her description of the rape that she said happened in the bathroom of the new house. Forrester also testified at trial. He denied the allegations. His attorney argued that K.F. fabricated her allegations so she could live with her mother rather than her father and stepmother.

After the trial, the jury found Forrester guilty as charged. The court sentenced him to an indeterminate sentence, with a minimum standard-range sentence of 162 months and maximum sentence of life in

prison. Forrester appeals.

ANALYSIS

Adult Court Jurisdiction

Initially, Forrester argues that he was erroneously tried and convicted as an adult because adult court's exercise of jurisdiction was faulty. He notes that juvenile court generally has exclusive jurisdiction over juveniles accused of committing crimes, and he contends that no exceptions apply in his case. Whether adult or juvenile court has jurisdiction is a question of law that we review de novo. State v. Todd, 103 Wn. App. 783, 787, 14 P.3d 850 (2000).

By statute, only juvenile court has the power to hear certain kinds of cases involving juveniles. Under RCW 13.04.030(1)(e), juvenile court has "exclusive original jurisdiction over all proceedings . . . [r]elating to juveniles alleged or found to have committed offenses . . . ," unless one of the exceptions in RCW 13.04.030(1)(e) is triggered. An exception occurs when juvenile court conducts a "decline hearing" under RCW 13.40.110 and determines that the declination of juvenile jurisdiction "would be in the best interest of the juvenile or the public."¹ Another exception occurs when "[t]he juvenile is sixteen or seventeen years old on the date the alleged offense is committed and the alleged offense is . . . rape of a child in the first degree."

¹ The parties agree that this exception does not apply here.

RCW 13.04.030(1)(e)(v)(C). Under this “automatic decline” provision, declination of juvenile jurisdiction is mandatory. A decline hearing is not required or permitted. State v. Salavea, 151 Wn.2d 133, 141, 86 P.3d 125 (2004).

Forrester argues that when the State first filed charges in adult court, the court did not have jurisdiction over him because he was still a juvenile and the automatic decline provision was not triggered. He maintains that automatic decline was faulty because the State’s charging period was not limited to dates when he was 16 or 17. But regardless of whether automatic decline was appropriate, Forrester’s jurisdiction argument fails because he was 18 at the time of trial. Under RCW 13.04.030, juvenile court has jurisdiction over juveniles, but its jurisdiction ends once a juvenile turns 18. State v. Nicholson, 84 Wn. App. 75, 77, 925 P.2d 637 (1996). “Even if a juvenile cause were pending and not yet heard on the merits prior to the juvenile’s 18th birthday, the juvenile court loses jurisdiction.” State v. Bushnell, 38 Wn. App. 809, 811, 690 P.2d 601 (1984); see also State v. Brewster, 75 Wn.2d 137, 141–42, 449 P.2d 685 (1969) (faulty transfer from juvenile to adult court had no impact because adult court had clear jurisdiction at time of trial due to defendant being over 18). The age of the accused at the time of trial determines whether juvenile or adult court has jurisdiction. Bushnell, 38 Wn. App. at 811; see also Sweet v. Porter, 75 Wn.2d 869, 870, 454 P.2d 219 (1969) (juvenile court jurisdiction is based on the defendant’s age on the trial date, not the date of the arrest, information, or plea). Under this long-standing principle, adult court jurisdiction was proper here because Forrester was 18 by the time of trial. We therefore do not address Forrester’s remaining challenges to adult court jurisdiction.²

Ineffective Assistance of Counsel

Forrester contends that his attorney deprived him of his right to effective assistance of counsel. To prevail on an ineffective assistance of counsel claim, Forrester must satisfy both prongs of a two-prong test. State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). First, he must establish that his attorney’s representation was deficient. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To show deficient performance, Forrester has the “heavy burden of showing that his attorney[] ‘made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment” State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Given all the facts and circumstances, his attorney’s conduct must have failed to satisfy an objective standard

² Forrester cites State v. Meridieth, 144 Wn. App. 47, 180 P.3d 867, review denied, 165 Wn.2d 1003 (2008), for the proposition that when the adult court assumes jurisdiction based on an incorrect application of automatic decline, its jurisdiction remains faulty even if the defendant turns 18 before trial. He infers that Meridieth had turned 18 by the time of trial based on isolated statements in the court’s recitation of the facts. Meridieth, 144 Wn. App. at 52 (“Meridieth’s case proceeded to jury trial in adult court and on July 12, 2006, the jury found him guilty” and “he turned 16 years old on May 25, 2004”). But Meridieth’s age at the time his trial commenced is not clear from the court’s factual description, and, in any event, this issue was not discussed in the opinion. In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised. See Webster v. Fall, 266 U.S. 507, 511, 45 S. Ct. 148, 149, 69 L. Ed. 411 (1925) (questions which merely lurk in the record but are neither brought to a court’s attention nor ruled upon are not considered to have been decided so as to constitute precedent). In Washington, longstanding case law holds that juvenile court loses jurisdiction once a juvenile turns 18, regardless of whether the adult court’s initial assumption of jurisdiction was proper. See State v. Calderon, 102 Wn.2d 348, 351, 684 P.2d 1293 (1984); Brewster, 75 Wn.2d at 141–42. Meridieth does not alter this rule.

of reasonableness. State v. Huddleston, 80 Wn. App. 916, 926, 912 P.2d 1068 (1996).

Second, Forrester must establish that the deficient performance resulted in prejudice such that “there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” Hendrickson, 129 Wn.2d at 78. The court employs a strong presumption that counsel’s representation was effective. McFarland, 127 Wn.2d at 335. And “this presumption will be overcome only by a clear showing of incompetence.” State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004).

Finally, in determining whether an attorney’s conduct fell below the standard of reasonable conduct, Strickland reasoned:

Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.

Strickland, 466 U.S. at 689 (citation omitted); accord, Burger v. Kemp, 483 U.S. 776, 789, 97 L. Ed. 2d 638, 107 S. Ct. 3114 (1987).

Forrester claims that his attorney was ineffective by failing to challenge adult court jurisdiction because automatic decline did not apply and by failing to seek an extension of juvenile court jurisdiction beyond his 18th birthday.

First, Forrester argues that automatic decline was faulty because the State’s charging period for the rape count included dates when he was 15, when automatic decline would not apply, and dates when he was 16 and 17, when automatic decline

would apply. However, as explained above, adult court jurisdiction was proper because Forrester was 18 at the time of trial. And once one criminal charge falls under adult court jurisdiction, all related charges fall under adult court jurisdiction. Salavea, 151 Wn.2d at 141.

Next, Forrester argues that adult court lacked jurisdiction because the charging documents did not support a probable cause finding that the offense occurred after he turned 16. He relies principally on Meridieth, which held that when the State alleges a charging period covering dates both before and after a juvenile turns 16, automatic decline is triggered only if the court finds probable cause existed to believe an enumerated offense (such as first degree child rape) occurred after the juvenile's 16th birthday.³ Meridieth, 144 Wn. App. at 56. But Meridieth was decided after Forrester's trial. An attorney's failure to anticipate a change in the law is not ineffective assistance. See In re Pers. Restraint of Benn, 134 Wn.2d 868, 939, 952 P.2d 116 (1998) ("If [State v. LeFaber], 128 Wn.2d 896, 913 P.2d 369 (1996)] is a significant change in the law, however, the defendant's ineffective assistance claim would fail on the merits because counsel could not be faulted for failing to anticipate such a change."). And many state and federal cases have concluded that an attorney's failure to raise novel legal theories or arguments is not ineffective assistance. See, e.g., Anderson v. United States, 393 F.3d 749, 754 (8th Cir. 2005) ("[c]ounsel's failure to raise [a] novel argument does not render his performance constitutionally ineffective"); Haight v. Commonwealth, 41

³ The State maintains that Meridieth's probable cause ruling was wrongly decided. Given our resolution of this issue, we need not address the State's contention.

S.W.3d 436, 448 (Ky. 2001) (“while the failure to advance an established legal theory may result in ineffective assistance of counsel under Strickland, the failure to advance a novel theory never will”); People v. Reed, 453 Mich. 685, 695, 556 N.W.2d 858 (1996) (“counsel's performance cannot be deemed deficient for failing to advance a novel legal argument”).

In addition, Forrester’s attorney knew from the discovery in this case that Forrester was 17 when K.F. finally disclosed the sexual abuse. And his attorney also knew from a taped interview with Wilske that K.F. had described a rape incident that happened in the bathroom of the new house after Forrester turned 16 years old. The certification for determination of probable cause filed in this case also described the rape in the bathroom.

Finally, in the motion to dismiss, the prosecutor certified under penalty of perjury that “the evidence contained in the discovery supports several charges of Rape of a Child in the First Degree and at least one of those incidents occurred after the respondent was sixteen years of age.” Under these circumstances, his attorney’s representation was not deficient for failing to challenge adult court jurisdiction or to seek extension of juvenile court jurisdiction. And Forrester fails to show the outcome would have differed even if the challenges had been asserted.

Prosecutorial Delay

Forrester also argues that the State’s delay in filing the amended information until after he turned 18 violated his right to due process of law. The amended information alleged two additional counts of first degree child rape. Whether prosecutorial delay violates a defendant’s

due process rights is reviewed de novo. Salavea, 151 Wn.2d at 138.

Offenders tried in juvenile court receive numerous benefits, including less harsh penalties, and the loss of juvenile court jurisdiction due to intentional or negligent prosecutorial delay may violate a defendant's right to due process. Salavea, 151 Wn.2d at 139. To determine whether a delay resulting in the loss of juvenile jurisdiction constitutes a due process violation, the court applies a three-prong test. "This test provides: (1) that the defendant show prejudice resulting from the delay; (2) that there are reasons for the delay which the court must consider; and (3) where the State can justify the delay, that the court engage in balancing the State's interest against the prejudice to the accused." State v. Dixon, 114 Wn.2d 857, 860, 792 P.2d 137 (1990). But where delay does not cause the loss of juvenile jurisdiction, there is no due process violation. Salavea, 151 Wn.2d at 145 (where offender was subject to mandatory automatic adult court jurisdiction, subsequent delay in filing charges did not cause loss of juvenile jurisdiction).

Here, Forrester's right to due process was not violated because any delay in filing the amended information did not cause the loss of juvenile jurisdiction. As explained above, Forrester was properly subject to adult court jurisdiction once he turned 18 based on the original information alleging one count of first degree child rape. Forrester does not claim prosecutorial delay related to that charge. And once one criminal charge falls under adult court jurisdiction, all related charges fall under adult court jurisdiction. Salavea, 151 Wn.2d at 141.

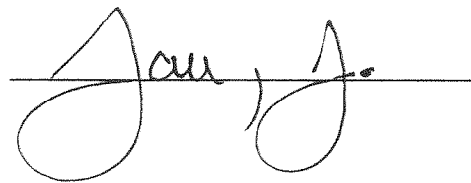
Moreover, Forrester fails to show that he was prejudiced given the State's evidence in this case. While Forrester

maintains that automatic decline was improper based on flaws in the State's charging documents, the State had sufficient evidence that he raped K.F. after turning 16 to trigger mandatory automatic adult court jurisdiction. Thus, the loss of juvenile jurisdiction was not based on the delay. Forrester was not prejudiced, and his due process rights were not violated.

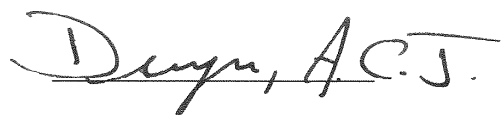
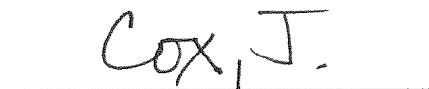
Sentence Under RCW 9.94A.712(2)

Finally, Forrester argues, and the State concedes, that the trial court acted without statutory authority in sentencing him to an indeterminate maximum sentence of life under RCW 9.94A.712(2). Under this statute, "[a]n offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section." Because Forrester was 17 years old or younger at the time of the offense, the sentence under RCW 9.94A.712 was improper. We accept the State's concession of error.

Accordingly, we affirm and remand for resentencing.

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WE CONCUR:

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